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SUPREME COURT, U.S.

No. 98-916

In The

Supreme Court of the United States

October Term, 1998

ALLISON DEAS,

Petitioner,

v.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT, RIVER WEST, L.P. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OBJECTION TO QUESTIONS PRESENTED

Petitioner lists as Question Presented Number 2, the following:

> "2. Did the lower courts err by requiring the employee to prove that her employer subjectively perceived the seizure disorder to be substantially limiting of a major life activity in order to defeat summary judgment?"

Respondent objects to the presentation of such a question at this juncture. This question was not raised in the courts below. Rather, petitioner, as plaintiff and appellant below, challenged the lower courts' finding that the employer perceived plaintiff as not being substantially limited in a major life activity.

Respondent interprets the question presented as injecting a new issue at this stage of the proceedings, i.e., the propriety of the standard of proof and methodology of analysis utilized by the lower courts. Until now petitioner has only challenged the factual finding that Dr. Dixon did not regard her as substantially limited in one or more major life activities. Here, petitioner challenges the requirement that she prove such a perception irrespective of the correctness of that perception. This issue was not raised below, and should not be considered here. (Appellate brief of Petitioner, pgs. 12-14, App., pgs. 14-17.)

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REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

Petitioner, Allison Deas, brings a request for review of decisions of the trial court and court of appeals which turn solely upon an analysis of the facts and evidence peculiar to the case. While Deas would have this Court grant certiorari to hold, as she argued below, that epilepsy or "seizures"[1] are disabilities *per se* under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12113 (Deas App., p. 53), the lower courts properly found that there had been no medical evidence presented by Deas that she has epilepsy, and that "seizures" were not a disability *per se*.

Deas' primary argument throughout, however, has been (and continues to be) her claim that she is disabled by virtue of having been regarded by her employer as having an impairment which significantly limits her in one or more major life activities.[2]

As to this argument, the lower courts found again, that the relevant decision maker, Dr. Strother Lindsey-

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[1] While Deas repeatedly refers in brief to epilepsy, there was never any evidence produced of any medical diagnosis of epilepsy. Throughout, Deas' condition has been characterized as "seizures."

[2] That River West is or was Deas' "employer" under the ADA has been contested by River West throughout, and continues to be contested. River West has filed a Rule 12.5 Conditional Cross Petition docketed as No. 98-1057 directed to that issue.

Dixon,[3] had perceived Deas as unable to safely fulfill the essential functions of an addiction technician in a hospital substance abuse unit – not, as urged by petitioner, that Dixon had regarded her as substantially limited in one or more major life activities.

Finally, Deas posits that the decisions below are in conflict "with decisions of other state and federal courts on parallel issues." (Deas' petition, p. 5.) However, petitioner fails to cite any such conflicting decisions.

Both courts' decisions turn upon factual analyses of the evidence. As Justice Stevens has noted, "We do not grant a certiorari to review evidence and discuss specific facts." *Texas v. Mead*, 465 U.S. 1041, 104 S.Ct. 1318, 79 L.Ed. 2d 714 (1984). Here, the lower courts made evidentiary analyses resulting in factual determinations of medical diagnosis, intent and perception.

As a factbound decision, the petitioner would have this Court review the evidence for a determination of whether the lower courts properly interpreted same, and whether their factual findings were manifestly erroneous. Under standards historically observed by this Court, this case is not appropriate for review on certiorari.

II. THE DECISIONS OF THE LOWER COURTS REGARDING DISABILITY ARE CORRECT.

A. DISABILITY *PER SE*.

Petitioner suffers from "seizures" wherein she becomes unaware of her surroundings and verbally

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[3] Dr. Dixon was medical director of AATC. By the time this action was filed in the trial court, AATC was no longer operating.

unresponsive for brief periods. These have been characterized by Dr. Dixon as *petit mal* seizures. In applying for a position as an addiction technician in AATC's substance abuse unit, Deas disclosed a history of "epilepsy (fits, seizures)" on her health history questionnaire. She was subsequently interviewed and hired by Dr. Dixon on July 13, 1993. Employment commenced on July 29, 1993.

On August 9, 1993, Deas appeared to suffer a seizure, same being witnessed by Dr. Dixon. Later that day, Dr. Dixon was approached by another AATC employee who reported having witnessed Deas having yet another seizure.

Based upon the foregoing, Dr. Dixon concluded that Deas' seizures were not well controlled and that Deas could not safely perform the functions of an addiction technician. Accordingly, she decided to discharge Deas.

Petitioner asks this Court to hold that under the ADA, "An employee who was perceived as suffering from recurrent seizures and terminated as a direct result of that perception should be treated as an employee who was regarded by her employer as disabled *per se*." (Deas' Brief, p. 6.)

The Fifth Circuit analyzed this issue in terms of "whether Deas produced sufficient evidence for a reasonable trier of fact to find that Dr. Dixon perceived her seizures as constituting a substantially limiting impairment. In other words, to have made a *prima facie* showing of disability, Deas must have produced sufficient evidence for a reasonable trier of fact to conclude that Dr. Dixon perceived her as having an 'impairment' *and* that this impairment, if it existed as perceived by Dr. Dixon,

would have substantially limited one or more of Deas' major life activities." 152 F.3d 471, at 476.

Deas first attempted to prove illegal discrimination by Dr. Dixon by arguing that "seizures" are a disability *per se*, and that perception of seizures should automatically equate to perception of an impairment which is substantially limiting of a major life activity.

Courts have uniformly declined to recognize various impairments as disabilities *per se*, emphasizing the importance of making such a determination on an individualized, case-by-case basis. See, e.g., *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 938 (3d Cir. 1997) ("Some individuals suffer from relatively mild forms of epilepsy which cause nothing more than 'minor isolated muscle jerks' – so we cannot and do not conclude that all epileptics are substantially limited by the impairment."); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, (7th Cir. 1998); *Bridges v. City of Bossier*, 92 F.3d 329, 336 (5th Cir. 1996); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997); *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 871 (1998). Generally, the concept of a *per se* disability has been rejected as being an incorrect analysis under the ADA. *Colwell v. Suffolk City Police Dept.*, 158 F.3d 635 (2d Cir. 1998); *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144 (2d Cir. 1998).

Additionally, as the EEOC Interpretive Guidance, 29 C.F.R. Part 1630.2(j), App. (1997) provides:

> "Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled.

> Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . .
>
> "The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a 'laundry list' of impairments that are 'disabilities.' The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling, or any number of other factors . . .
>
> "On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities."

The illogic of petitioner's argument is apparent upon simple inspection. Presented as syllogism, it goes something like this:

A. "Seizures" are disabling *per se*, that is, substantially limiting of a major life activity;

B. Dr. Dixon perceived Deas as having a seizure disorder;

C. Therefore, Dr. Dixon regarded Deas as being substantially limited in a major life activity.

Petitioner's position, then, suggests foreclosure of any factual inquiry by the Court into *what* the employer perceived, by establishing an irrebuttable presumption not only as to the impairment's limiting extent, but as to *the observer's perception of that impairment as well*. Such a construction of the statute obviates the need for the "regarded as" prong of the definition of "disability" by militating that where one has an impairment classified as "disabling *per se*", an employer can *only* perceive an individual as substantially limited in a major life activity irrespective of the reality of the situation.[4] It further misreads the actual language of the statute, which speaks in terms of regarding "impairments," not "disabilities." In suggesting such an approach, petitioner simply asks this Court to write the concept of "impairment" out of the ADA's definition of disability as concerns the conditions of "seizure" and epilepsy.[5] As earlier noted, however, the EEOC itself eschews the concept of *disability per se* in

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[4] This assumes, of course, that one can ignore the primary circularity of petitioner's position: that one who has a disability *per se* would qualify as *actually* disabled under the first prong of the definition of "disability," and would not, therefore, need to invoke the "regarded as" prong, as she does here.

[5] EEOC Interpretative Guidance, 29 C.F.R. Part 1630.2(h), App. (1997) plainly states that, "[A]n individual with epilepsy would be considered to have an *impairment* . . . " (Emphasis added.) That Deas has an impairment is not contested. See, also, *School Board of Nassau County, Florida v. Arline*, 107 S.Ct. 1123 at 1127, n. 5: "The department also reinforced what a careful reading of the statute makes plain, 'that a physical or mental impairment does not constitute a handicap for purposes of Section 504 (of the Rehabilitation Act) unless its severity is such that it results in a substantial limitation of one or more major life activities'." (Parenthetical material added.)

almost all cases except where, unlike here, substantial limitation of one or more major life activities is an omnipresent hallmark of the impairment, *i.e.*, the limitation is coextensive with the disease. EEOC Interpretive Guidance, 29 C.F.R. Part 1630.2(j), App. (1997).

As a final consideration, it should be noted that the petitioner never presented any medical evidence as to her diagnosis, nor did she claim to be limited by her impairment in any significant way. Although petitioner attempts to cast this case in terms of abstract and lofty policy considerations, it is in reality merely one in which the lower courts found Deas to have adduced no factual evidence to support her contentions.

B. DR. DIXON'S PERCEPTION.

Petitioner contends that the lower courts erred in "requiring the plaintiff to prove that her employer subjectively perceived her seizure disorder to be substantially limiting of a major life activity." This argument was never raised in the trial or appellate courts. Viewed differently, the argument appears to be a restatement of the "disability *per se*" argument, for one's perception is by its very nature subjective. Petitioner would as an alternative have this Court remove the concept of impairment (as distinguished from disability) from the statute such that what was perceived would not matter – if seizures were perceived, the employer would objectively be held to have perceived not impairment but disability.

Respondent respectfully submits that, had Congress so intended, it would not have gone to such lengths to

structure the analysis as it did. Rather, Congress could have, and probably would have, created certain categories of conditions as to which no proof of substantial limitation of major life activities (or proof of perception of such) would be required. It did not do this.

Petitioner invoked the "regarded as" prong of the definition as the basis for her cause of action. The plain language of the statute requires that she produce evidence from which a rational trier of fact could conclude that Dr. Dixon perceived her as substantially limited in a major life activity. Factual analysis of the evidence by the Court of Appeals failed to reveal such evidence.

Petitioner also challenges the *correctness* of Dr. Dixon's perception, something which is manifestly beyond the historical purpose and scope of this Court's certiorari review. Nevertheless, respondent would simply point out several facts supporting that perception. First, Dr. Dixon, a board-certified psychiatrist with substantial substance abuse clinic experience, did not make the decision to terminate Deas upon first witnessing her having a seizure. It was not until she was informed by an employee of another seizure on the same day that she concluded that Deas could not work in the substance abuse unit.

Second, Dr. Dixon's affidavit makes clear that she felt that Deas' condition rendered her unable to safely deal with substance abuse patients. Dr. Dixon felt that even two seizures *per month* would disqualify one from the position in question. She did not, however, consider Deas to be substantially limited in any major life activity; her reservations centered only upon Deas' ability to do the

job in question. (Dixon deposition and affidavit, App. pp. 1-13).

Finally, Dr. Dixon knew that Deas had been employed before, and felt that she could do other jobs (Affidavit of Dr. Dixon, App. pp. 2-3).

The foregoing clearly indicates that Dr. Dixon did not perceive petitioner as being substantially limited as to any major life activity, or as to the major life activity of working. Rather, she believed her to be unable to perform the functions of one job – that of addiction technician.

It is well settled that the inability to do a particular job does not constitute a substantial limitation in the major life activity of working. *Talanda v. K.F.C. National Management Co.*, 140 F.3d 1090 (7th Cir. 1998); *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144 (2d Cir. 1998); *Witter v. Delta Airlines*, 138 F.3d 1366 (11th Cir. 1998); *Hamilton v. Southwest Bell Telephone Co.*, 136 F.3d 1047 (5th Cir. 1998); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867 (2d Cir. 1998); *Davidson v. Middlefort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997); *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466 (8th Cir. 1996), rehearing and suggestion for rehearing en banc denied (1997); *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996).

Further, with regard to other impairments, the limitation must be "significant." *Talanda, supra; Reeves, supra; Ryan, supra; Davidson, supra.* This is also true of perception cases: the employer must regard the employee as having an impairment, and must regard that impairment as substantially limiting the employee in one or more major life activities. The job decision in question must be

based upon that perception. *Colwell v. Suffolk County Police Dept., supra; Ryan v. Grae & Rybicki, P.C., supra; Francis v. City of Meriden,* 129 F.3d 281 (2d Cir. 1997); *Roberts v. Unidynamics Corp.,* 126 F.3d 1088 (8th Cir. 1997); *Runnebaum v. Nationsbank of Maryland, M.D., N.A.,* 123 F.3d 156 (4th Cir. 1997); *Bridges v. City of Bossier, supra; Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723 (5th Cir. 1995).

Clearly, the lower courts reviewed the evidence and found that Dr. Dixon perceived Allison Deas not as substantially limited in any major life activity, but as unable to perform the requirements of a particular job. Under the circumstances, this was purely a factual decision, and certiorari should not be granted.

III. CONCLUSION

The evidence was thoroughly and correctly reviewed by the lower courts. Both found petitioner's evidence factually insufficient to defeat summary judgment. This Court is respectfully urged to decline review of this matter, and to deny the petition for certiorari.

Respectfully submitted,

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APPENDIX

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority came and appeared **STROTHER P. LINDSEY-DIXON, M.D.**, of full age of majority and a resident of the Parish of East Baton Rouge, State of Louisiana, who, being by me first duly sworn, deposed and said:

I interviewed Ms. Allison A. Deas on June 21, 1993 for the position as Addiction Technician (for the AATC/ Strivers Alternative Addiction Treatment Program ("Strivers") and approved her for hire on July 13, 1993. Ms. Deas was a part of the first group of persons hired for the Strivers' Alternative Addiction Treatment Program.

On the afternoon of August 9, 1993 I called the staff of the Strivers' Program together for a lecture (as part of their orientation to the unit). I noticed that Mr. Lane and Ms. Deas joined the group somewhat later. When Ms. Deas came to the group she seemed distant and uncomfortable. Her condition was so obvious I asked her in front of the group whether she felt well. She responded that she had been ill with decrease appetite and weight loss. She admitted she had a headache and some stomach problem. She discussed in front of the group that she had a number of tests run but nothing could be found to account for her condition. While I was lecturing to the group I noticed Ms. Deas had a blank look on her face and she looked away. When I called her name, she did not respond and some 45 seconds later she seemed to

have regained her familiarity of her surroundings. After this episode she then began to ask questions which had no relationship to what was being discussed. It was clear to me that she had just experienced a petit mal seizure. Later, Mr. Lane, (certified substance abuse counselor) expressed to me a concern that he had relative to Ms. Deas, (with obvious reluctance), that earlier in the day Ms. Deas was sitting across from him talking and suddenly became non-communicative with no recognition on her face of his presence and unresponsive to him verbally. According to Mr. Lane this episode lasted several minutes. She then became responsive to his presence.

It was clear to me that Ms. Deas had experience two petit mal seizures in the course of one day, which to me indicated that her seizures were not well controlled. Given the nature of the type of patients (substance abuse and dually diagnosed) we anticipated being admitted to the Strivers Program and the fact that the Strivers Program included a medical detoxification program which would require close supervision of the patients (who themselves are frequently prone to seizures and other severe medical problems) by staff, with the Addiction Techs being the front line staff in this process. It was my opinion based on my previous experience as Medical Director of two (2) other inpatient Substance abuse and Dually diagnosed units, that a person experiencing uncontrolled petit mal seizures would be a direct threat to the safety of themselves and the patients. Given my observation of Ms. Deas and evaluation of the circumstances surrounding her employment, as Medical Director and Attending Physician for the Strivers' program it was my opinion that Ms. Deas' continued employment

with the Strivers' program would be a direct threat to her and the patients' safety, and it was my duty to terminate her employment.

In my medical opinion and based on my experience as a Social Security Disability Examiner, Ms. Deas' seizures did not substantially limit her ability to work by limiting any of her major life activities. It was clear to me (from my interview of Ms. Deas) that Ms. Deas had been employed prior to Strivers and it was my opinion that she could preform [sic] other work. Ms. Deas' termination was based on my opinion that her uncontrolled seizures constituted a threat to the safety to herself and the patients that I would be admitting and be held responsible for on the Strivers's unit.

/s/ Strother P. Lindsey-Dixon
STROTHER P. LINDSEY-DIXON, M.D.

SWORN to and subscribed before me this 3rd day of September, 1996.

/s/ Edward Dixon
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ALLISON DEAS

VERSUS

RIVER WEST, L/P, ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC., AND STROTHER P. LINDSEY-DIXON

NUMBER: 95-353

DIVISION: "B-1"

TRANSCRIPT OF THE DEPOSITION OF
STROTHER P. LINDSEY-DIXON

REPORTED IN THE ABOVE-ENTITLED AND NUMBERED CAUSE, BEFORE SHELLEY G. PAROLA, CERTIFIED COURT REPORTER, AUTHORIZED TO ADMINISTER OATHS OF WITNESSES, PURSUANT TO THE FOLLOWING STIPULATION:

REPORTED AT THE OFFICE OF:

ASSOCIATED REPORTERS, INC.

ONE AMERICAN PLACE, SUITE 1535

BATON ROUGE, LOUISIANA 70825

COMMENCING AT 2:45 P.M. ON SEPTEMBER 18, 1996

* * *

[p. 5] DR. STROTHER P. LINDSEY-DIXON

11934 COURSEY BLVD., BATON ROUGE, LOUISIANA, 70816, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. RASTANIS:

Q. Dr. Dixon, would you explain to me please why Ms. Deas was terminated.

A. Ms. Deas was terminated, in my medical opinion and my opinion as a former disability determinations officer, that her seizures were out of control, and I felt that it would be dangerous for her, and a danger to the patients that I intended to admit on the unit, to have her as an employee.

Q. What led you to believe that her seizures were out of control?

A. Because I saw her have a seizure during the orientation period.

Q. Okay, and tell me about that.

A. I was giving a presentation to the employees, and I noticed Ms. Deas turned her head very automatically to one side. And her head stayed that way for several seconds and the facial expression was blank.

I called her name, and she did not respond. Then she turned her [p. 6] head back around and I asked her if she were all right, and she said that she was. But then she asked me a question that had nothing to do with the content of the presentation.

Q. What did she ask?

A. She asked how did one evaluate a brain tumor.

Q. And did you answer her?

A. I told her that was not a question that was appropriate at the time.

Q. And how did she respond?

A. She didn't say anything.

Q. And you diagnosed her at that point in time?

A. I knew that something was wrong with Ms. Deas at that point in time.

Q. Okay. And when did you determine that was a seizure?

A. I felt it was a seizure at that point in time.

Q. Okay. So you made the decision that she had suffered a seizure in your presence?

A. Yes.

Q. What, a petit mal seizure?

A. A petit mal seizure, one does not necessarily lose consciousness, but awareness; and they don't have a general jerking and spasmodic reaction throughout the body, but they are not aware of their surroundings. And

* * *

[p. 11] Q. Okay.

A. They might hurt her physically and she not be aware of it.

Q. Okay. Well, tell me a place that she could work that would be safer than a hospital for someone who has seizures.

A. I could tell you a number of places.

Q. Please.

A. She could be a good receptionist.

Q. What would stop somebody from trying to take advantage of her there?

A. The kind of people that we admitted on the unit would be of higher risk kind of people who would do unusual acts, and they have done it in the past.

Q. Well what kind of people did you have on the unit?

A. We didn't have any persons on the unit at that time when she was hired.

Q. Well what kind of people did you have on the unit that would be more dangerous than your average person?

A. They would be people who were under the influence of substances, illegal substances as well as alcohol.

Q. Well it was my understanding that the people in your unit would not be under the influence.

A. Well they would come into the hospital to be detoxed, so they would still have some influence of

* * *

[p. 16] A. Other patients could have a seizure.

Q. Okay, what could Allison do if somebody was having a seizure?

A. She could report to the nurse that it was happening.

Q. Um-hmm.

A. She could be available to answer the phone if that were happening, to institute any other kind of medical connections that we needed to make for the hospital, or even help to – in the transportation of the patient to another unit if we had to.

Q. So it's your opinion, as a doctor, that somebody who suffers from seizures shouldn't work in a hospital at all?

A. I felt that the type of unit that we had and the number of employees that we had that Allison Deas, in her condition, could not be a value to the unit and could be a danger to herself.

Q. Because of these things that she was unable to do, right?

A. Because during the time of the seizures, she would be unable to help out with other patients and put herself at risk being in the presence of patients that could take advantage of her.

Q. Who sent out the job references for Ms. Deas?

* * *

[p. 26] Q. You had an obligation to tell the hospital what you were doing with your employees?

A. Yes.

Q. Okay. You worked as a Social Security disability examiner?

A. Yes.

Q. How many uncontrolled seizures a months does it require to be disabled under the Social Security rules?

A. Beg your pardon?

Q. Isn't it true that under the Social Security rules, two uncontrolled seizures per month qualifies as totally disabled?

A. Oh, I don't know.

Q. You testified that based on your experience as a Social Security disability examiner, Ms. Deas' seizures are 99. Do you know what the requirements are to be considered disabled under Social Security when it comes to seizures?

A. I know that having seizures, two in a day, is too many for the unit where Ms. Deas was going to be employed.

Q. How many would have been okay? If two a day is too many, could she have had one? Would that have been okay?

A. I feel that people having seizures on the unit that we had, that was not good. It was a dangerous thing.

* * *

[p. 27] Q. So any seizures, any amount of seizures, in your opinion, she would have had to have been let go?

A. I cannot postulate that. I only can say what I saw.

Q. I know. You say you saw two, and two is too many, right?

A. No, I saw one.

Q. You're aware of two?

A. Yes.

Q. Two is too many?

A. In the same day, yes.

Q. Okay. Well how about if she had only had one?

A. No, I'm not going to – I'm not going to say that. I said I let her go because I'm aware she had two seizures in the same day. That's too many.

Q. That's too many? Is one too many?

A. Two on the same day is too many.

Q. Would two in the same month be too many?

A. Two on the same day, in my opinion, is too many.

Q. Would two in the same month be –

MR. WALKER: Objection, I think you're badgering the witness. She answered your question.

MR. RASTANIS: No, she won't answer my question.

[p. 28] MR. WALKER: She answered your question.

MR. RASTANIS: No, she won't. She's being unresponsive.

A. Two in the same day in this situation was too many for me, and I felt it was dangerous for her and the unit.

BY MR. RASTANIS:

Q. Tell me what your experience is as a Social Security disabilities examiner. What do you know about seizures and Social Security disabilities?

A. I know that people can be in good control and have seizures once in six months, once in three months, once in several years and still be considered people with seizures.

Q. What's that have to do with Social Security disabilities?

A. Because a lot of times they come in with other conditions along with seizures, and I've seen them.

Q. What's the policy under the Social Security disability laws for seizures?

A. Again, for this situation –

Q. No, Ma'am, that's not what I'm asking about. You state in your affidavit –

A. That's right.

Q. – that in your opinion as a Social Security [p. 29] disability examiner –

A. Um-hmm.

Q. I want to know what now that you have, as a Social Security disabilities examiner, when it comes to seizures and disability?

A. Seizures are considered controlled when they are one or two a month, as you said.

Q. That they're controlled if you have one or two a month?

A. Yes, that's considered good control.

Q. Okay. And if you had somebody who had seizures that were in good control –

A. It depends on –

Q. May I finish please, Doctor.

A. I'm sorry.

Q. If somebody had one or two controlled seizures a month, would that have been okay for her to work in the unit?

A. Again, I feel that this is a job sensitive area, and in an area like we were working in, no, I do not think that people who have seizures on that unit would be a good idea.

Q. Even if they're controlled or not controlled, right?

A. Well there is good control, yes.

[p. 30] Q. Would people with seizures with good control have been allowed on the unit?

A. For instance, if a person was an airplane pilot, seizures are not acceptable.

Q. Okay, that's fine. But what I'm asking you is if she would have – if it had been one of these controlled situations like you just said –

A. No, seizures that are under good control.

Q. If her seizures would have been under good control –

A. Yes.

Q. – would she have been allowed to stay?

MR. WALKER:

It asks her to speculate. I object to the question.

MR. RASTANIS:

It's her affidavit she is speculating.

A. Again, I would feel that it's a job sensitive area, and I would say, no, it's not a good employee mix to have a person who has seizures once or twice a month working on such a unit. I feel that she would be at risk and the unit would be at risk.

BY MR. RASTANIS:

Q. Did you review any of the medical records that she had at the hospital?

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 97-30154

ALLISON DEAS

Plaintiff-Appellant-
Cross Appellee

VERSUS

RIVER WEST, L.P.; ET AL.

Defendants

ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; STROTHER P. LINDSAY-DIXON

Defendants-Appellees

RIVER WEST, L.P.

Defendant-Appellee-
Cross Appellant

Appeal From The United States District Court
for the Middle District of Louisiana
Docket No. 95-353-B-1
Honorable Stephen C. Riedlinger,
Magistrate Judge, presiding

Original Brief of Allison Deas Plaintiff-Appellant-Cross Appellee as Appellant

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SUMMARY OF THE ARGUMENT

Plaintiff proved in the trial court that she is "disabled" under the ADA, because even though she has a physical impairment that is not substantially limiting, the defendants regarded her as having a physical impairment that substantially limited her in the major life activities of seeing, hearing, speaking, and working.

Plaintiff shows that many cases interpreting the ADA and the Rehabilitation Act of 1973 have held that epileptic-type seizures constitute a disability *per se*. The undisputed facts in this case are that the plaintiff has occasional mild seizures and that she was discharged from her position because the defendants perceived her to be substantially limited because of this condition. Under these facts, the magistrate judge should have rendered summary judgment in favor of Miss Deas on the issue of liability, given the case law. The magistrate judge did not cite any statutory or case authority in erroneously ruling that epileptic-type seizures are not disabling *per se* as a matter of law.

Allison Deas further shows that the magistrate judge erred in ruling that a loss of consciousness or awareness does not substantially limit major life activities under the ADA. The summary judgment record shows that during plaintiff's alleged seizures at River West, Miss Deas reportedly could not visually recognize the person she was with, hear her name being called, or respond verbally. Plaintiff thus shows the defendants perceived her

as having substantial limitations in the major life activities of seeing, hearing, and speaking, which resulted in the defendants' decision to discharge Miss Deas from employment at River West Medical Center. Plaintiff shows that seeing, hearing, and speaking are all specifically listed as major life activities within the regulations interpreting the ADA. Plaintiff shows that her alleged losses of consciousness or awareness would be by definition and nature inclusive of the major life activities of seeing, hearing, and speaking, and that since the record shows that the defendants perceived Miss Deas to be substantially limited in these major life activities, and fired Miss Deas as a direct result of this perception, the magistrate judge erred in failing to grant plaintiff summary judgment on the issue of liability under these undisputed facts.

Plaintiff further shows that at the time of her discharge, the defendants also perceived her as having a physical impairment that substantially limited her in the major life activity of working. The record on summary judgment contains undisputed evidence that the defendants perceived that Allison Deas was significantly restricted in her ability to do a class of jobs or a broad range of jobs in various classes. Dr. Dixon testified that Miss Deas could not work in a substance abuse clinic or in a hospital. Miss Deas testified that both Dr. Dixon and Mrs. Miller informed her that they could not find a job to accommodate her anywhere else in the hospital. Thus plaintiff shows that conclusive evidence is in the record that shows the defendants perceived her as being substantially limited in the major life activity of working,

and that this perception was the direct cause for plaintiff's discharge, warranting summary judgment in favor of Miss Deas as to the defendants' liability under the ADA.

Plaintiff shows this Court that the record does not contain sufficient competent evidence to support any contention that her condition constituted a direct threat to her safety or that of the patients on the unit. The record further shows that despite their disclaimers to the contrary, the defendants made no attempt to provide Miss Deas with reasonable accommodation for her perceived disability before discharging Miss Deas from employment at River West Medical Center.

Plaintiff thus shows that under the undisputed facts, the magistrate judge erred in denying plaintiff's motion for summary judgment on the issue of liability, and further erred in granting summary judgment to the defendants ruling that plaintiff was not "disabled" under the ADA. Allison Deas shows that she rather than the defendants is entitled to judgment as a matter of law in this case.